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SUPREME COURT, U.S.

Docket # 07 - 905

Supreme Court of the United States

Thomas Lamont Dyno

Petitioner

v.

The Village of Johnson City, New York

Respondent

On Petition for Writ of Certiorari to
The United States Court of Appeals
For the Second Circuit

Petition for Rehearing

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Jurisdiction & Timeliness

This petition for rehearing, authorized by Rule 44.2 of this Court is filed within 25 days of the April 14, 2008 denial of My Petition for a Writ of Certiorari; and as certified in good faith is limited to other substantial grounds not previously presented.

The reason for rehearing is

(1) That illegal uses of land are proliferating under an official policy of the Village in violation of the Federal Constitution to my injury in fact and to those persons similarly situated; and that

(2) Said Village policy was facilitated by an arbitrary administrative procedure resulting from the irreparable injury rule; and

(3) That this Court overlooked and allows to stand an official Village policy which allows the municipality to subject and cause a private single family residential house holder to be subjected to an adjacent private intentional nuisance in fact, by an "interpretation" of her zoning ordinance, where strict construction is Constitutionally required.

Statement of Facts

1. My Monell complaint declaring 3 official Village Policy actions that subjected and caused me to be subjected to a private adjacent intentional nuisance in fact depriving me of property without due process of law in violation of Federal equal protection was dismissed under **FRCP 12(b)(6)**.

2. The NYS Court of Appeals ruled as settled law: that if a municipality fails to enforce her zoning

ordinance then a person injured in fact may petition for injunctive relief against a violation (hereinafter "right to petition"). **[I, I(A)** p. 4 *infra*]

3. In re equitable relief The NYS 3rd Department Appellate Division (hereinafter "the 3rd Dept.") imposes the irreparable injury rule, requiring proof of municipal refusal; and will not grant mandamus, to compel enforcement of local law;

4. To avoid dismissal under the irreparable injury rule the alternative is to file a complaint with the local code enforcement officer: with hir decision appealable to the zoning board of appeals and by statute, the board's decision, is subject to **NYS CPLR ¶78** mandamus to review.

Facts in re Deep Issue

6. Imposing a local administrative zoning procedure between my injury in fact and my right to petition is without authority resulted in a judgment without due process obtained by fraud on the court and deprived me of my right to petition under NYS law.

7. The 3rd Dept., practice of requiring me to file a zoning complaint before petitioning for injunctive relief provided a lawyer with the opportunity to improperly influence and mislead the local zoning board: 1st by means of a non-appealable informal letter which the board adopted in part as its decision and 2nd by submitting to the NYS Supreme Court, de hors matter never served upon me: comprised of a lawyer's misrepresentation of the actual zoning board decision supported by his interpretation of local law in lieu of the strict construction. **[I (A)(iv), (B)(iii)**; pp., 6-7, 8 respectively]

8. The result of the foregoing misrepresentation and deceit was a judgement in violation of settled rules relegating mandamus to review to the grounds invoked by the board, and in violation of the doctrine that a municipal zoning ordinance must be strictly construed. [**I (A)(i)** thru **(iv)**, pp. 5-7].

9. The foregoing judgment continues to serve as the basis of a general Village policy: declaring a lawyer's interpretation of a zoning ordinance, in lieu of the strict construction thereof, rendering an intentional nuisance in fact legal: while under strict construction of the ordinance, the use is a prima facie zoning violation, the legality of which was never fully or fairly determined under State or Federal law.

10. The foregoing 3rd Dept practice and judgment deprived me of a full and fair opportunity under settled NYS law to litigate an action for injunctive relief against a prima facie zoning violation. [**I, I (A)**]

The Federal Issue

11. The judgment dismissing the mandamus to review petition was not based on the grounds invoked by the board nor strict construction of the ordinance but instead was based on a lawyer's interpretation of the ordinance in violation of the settled rule for mandamus to review and the strict construction doctrine [pp. **5-7**];

12. The Federal Issue arose when the Village Mayor and Board of Trustees adopted said judgment and by official Village policy action(s) declared all such uses of land legal; and thereby created and defended a private property interest outside the bounds of the 14th A. to the U.S. Constitution [**I (B)** *ff.* **(iv)** pp. 8-9]

Argument

I) Imposition of an administrative zoning procedure as a precondition of my right to petition deprived me of Federal due process.

The Statutory Procedural Scheme of **NYS Village Law §7-714**, as construed in **Little Joseph Realty, Inc. *v* Town of Babylon** 41 NY 2d 738; 363 NE 2d 1163; 395 NYS 2d 428 @ NYS 2nd 431 headnote [1, 2] declares that if a municipality fails to enforce her ordinance a person injured in fact may petition for injunctive relief against the zoning violation

Lugar *v* Edmonson Oil Co. 457 U.S. 922, 937, 941:

> "[T]he deprivation must be caused by the exercise of some right or privilege created by the State ... Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor .... [T]he procedural scheme created by the statute obviously is the product of state action. This is subject to constitutional restraints and properly may be addressed in a 1983 action, if the second element of the state-action requirement is met as well".

I was deprived of my right to petition so that a lawyer's interpretation where strict construction is required might serve as pretence to declare a private nuisance and zoning violation legal.

(A) **28 USC 1652** requires the Federal Courts to accept "[t]hat the laws of the several states shall be regarded as rules of decisions in trials at the common law".

Under NYS Law:

(i) Jurisdictional Limits on Judges & Zoning Boards

Judges or Zoning boards or are not authorized to rezone **Little Joseph Realty, Inc. *v.* Town of Babylon** (op cit) 363 NE 2d 1163@ hdn [11]:

> "[W]hen it has been established that a defendant violates a valid zoning ordinance, there is no need for judicial accommodation of the defendant's use to that of the plaintiff. For a court to do so would be for it to usurp the legislative function . . . If the defendants can continue the unlawful use of property . . . the trial court's judgment would have worked to rezone the land ... notwithstanding the fact that the power to do so is reserved to the town board alone (National Land & Inv. Corp. v. Easttown Twp. Bd. of Adjustment, 419 Pa. 504, 521-522, 215 A. 2d 597)".

Matter of Scherbyn *v* Wayne Finger-Lakes Brd. of Co-op Ed. Services, *et al.* 77 NY 2d 753; 573 NE 2d 562:

> "It is a settled rule that judicial review of an administrative determination is limited to the grounds invoked by the agency . . . . If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis'

(ii) Constitutional Right of Trial by Jury

CPLR 4101.2 a private intentional nuisance in fact is a triable issue and summary Judgment cannot stand where a triable issue is present.

(iii) The Strict Construction Doctrine

Matter of 440 East 102nd Street Corp. *v* Murdock 285 NY 298 @ 304-305:

"Zoning laws which curtail and limit uses of property confer no privilege upon property owners. Even though in case of necessity such laws are properly within the exercise of the police power, the whole and each and every one of the parts must be given a strict construction since they are in derogation of common-law rights"

Cogswell *v* NY, NH & H. R.R. Co. 103 NY 10 @ 21

"Statutes in derogation of private rights, or which may result in imposing burdens upon private property, must be strictly construed.... The same principle is stated with unusual force of language by Chief Justice Marshall in *United States v Fisher* (2 Cranch, 390). He says: 'Where rights are infringed, where fundamental principles are overthrown, where the general system of laws is departed from, the legislative intention must be expressed with irresistible clearness to induce a court of justice to suppose a design to effect such objects"

(iv) Interpretation v Strict Construction

Matter of Hines *v* LaGuardia 293 NY 207, 216:

"[We do not find] ambiguity sufficient to raise a reasonable doubt as to the intention of the framers of those laws. In such circumstances, we may not . . . give weight to administrative practice [that] followed a course not approved by

either statute or rule. Administrative practice may not thwart a statute the purposes of which are as clear as those here involved [citing *inter alia*] *Neuberger* v. *Commiss.* 311 U.S. 83, 88-89".

People ex rel W.S. Electric Co. *v* CT & ES Co. 187 NY 58, 66-67:

"We are asked to adopt the interpretation of the act of 1887 which would sustain the position of the appellant on the ground that for several years the statute was practically construed in accordance with that view by various public officers of the city of New York . . . . There is no room for the application of the doctrine of practical construction in the case of a statute free from ambiguity or not subject to any reasonable doubt as to the meaning of its provisions....'Where no ambiguity or doubt appears in the law we think the same rule obtains here as in other cases, that the court should confine its attention to the law and not allow extrinsic circumstances to introduce a difficulty where the language is plain' (Cooley's Const. Limitations [6th ed], p. 84".

(v) Limited Powers of Municipalities

NYC v NYS 86 N.Y.2d 286, 655 N.E.2d 649, 631 N.Y.S.2d 553 citing **Worcester *v* Worcester Consol. Street R. Co**. 196 US 539, 548-551.

Municipalities are mere agents of the State and thus her only powers are those granted to her by the Legislature; consequently she cannot have any powers which the State does not or cannot itself have; and no Judge can change that reality with hir absolute immunity or otherwise.

(B) **¶VI, cl. 2 of the U.S. Const.** in conjunction with 28 USC §1652 incorporates the foregoing State law as well as the following precedents for the vindication of my Federally protected rights:

(i) There is no right to impose a Private Nuisance

Keystone Bituminous Coal Assn *v* Benedictus 480 U.S. 470, 491 n. 20:

> "[N]o individual has a right to use his property so as to create a nuisance or otherwise harm others, the State has not 'taken' anything when it asserts its power to enjoin the nuisance-like activity".

(ii) Common Law Property rights Federally protected

Catlette *v* U.S. 132 F2d 902 @ 906 hdn 3 alludes to some rights protected under U.S. Const. 14th A. Citing **Meyer *v* Nebraska** (1923) 262 US 390, 399, 43 S. Ct. 625, 67 L. ed. 1042, 29 ALR 1446:

> "[The right] to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men".

(iii) If there is "Room for Interpretation"

Arkansas Natural Gas Co. *v* Arkansas Railroad Commission 261 U.S. 379, 383 citing **Railway Co. *v* Arkansas** 235 U.S. 350

> "The rule is fundamental that, if a statute admits of two constructions, the effect of one being to render the statute unconstitutional and of the other to establish its validity, the courts will adopt the latter".

If no individual can legally impose a private nuisance **[I(B)(i) supra]** then a municipality or a court can't make such imposition legal **[I(A)(v)]**. Under NYS law, an alleged private nuisance cannot be ruled legal without Trial by Jury **[I(A)(ii)]** and thus dismissal of a mandamus to review petition cannot make a private intentional nuisance in fact legal under a municipal zoning ordinance governing single family residential districts. Under strict construction of the ordinance, the use is not allowed and all illegal uses of land are zoning violations. I have the right under NYS law to have a full and fair opportunity to prove the violation in an action for injunctive relief **[I(A)(i)]**. Interference with that right by the municipality and/or the Judiciary is a violation of Federally protected due process: any judgment obtained therefrom or action thereon is as equally devoid of due process.

(iv) **Shelley *v* Kraemer** 334 US 1, 22; 92 L. Ed 1161:

> "[T]he power of the State to create and enforce property interests must be exercised within the boundaries defined by the Fourteenth Amendment. *Cf.* Marsh *v.* Alabama, 326 U.S. 501, 90 L. Ed. 265, 66 S. Ct. 276 (1946)".

(II) Letting the Village policy stand allows the Village to subject and cause persons to be subject to such deprivation without due process of law and in violation of Federal equal protection.

If an adjacent use of land in a single family residential suburban zoning district deprives a person of the enjoyment of life and property then it is

triable as a nuisance **[I(A)(ii)]** and if it results from policy actions of the municipality or those said to represent it, then said actions are deprivations of property without due process of law..

(A) Property Rights Protected

(i) **In re Jacobs** 98 NY 98 @105:

> "The constitutional guaranty that no person shall be deprived of his property without due process of law may be violated without the physical taking of property for public or private use. Property may be destroyed, or its value annihilated; it is owned or kept for some useful purpose and it has no value unless it can be used. Its capability for enjoyment and adaptability to some use are essential characteristics and attributes without which property cannot be conceived; and hence any law which destroys it or its value, or takes away any of its essential attributes, deprives the owner of his property"

(ii) **Munn v. Illinois** 94 U.S. 113, 4 Otto 113, 24 L. Ed 77 @ U.S. 124-125, 142-143:

> "If, for instance, the owner is prohibited from using his building for the purposes for which it was designed, it is of little consequence that he is permitted to retain the title and possession; or if he is compelled to take as compensation for its use less than the expenses to which he is subjected by its ownership, he is, for all practical purposes, deprived of the property, as effectually as if the legislature had ordered his forcible dispossession".

(iii) **Booth *v.* R., W., & O.T.R.R. Co** 140 NY 257, 35 NE 592 @ NY 274-275:

> "The protection of property is doubtless one of the great reasons for government. But it is equal protection to all which the law seeks to secure"

(iv) **Yick Wo *v* Hopkins** 118 US 356 @373-374

> "Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution. This principle of interpretation has been sanctioned by this court [cites omitted]"

Solution

An order affirming my argument and declaring the Village policy on the unpublished judgment of NYS JSC Robert S. Rose, unconstitutional.

An unconstitutional Village Policy premised on the unpublished opinion of NYS JSC Rose: that Pig is for the sustenance of man, so that I ought not have, so delicate a nose **Aldred's Case** 9 Coke Rep. F. 57b Holmes would surely dissent. Accepting my sacrifice of the last 13 years: tens of thousands of dollars in court fees, printing, equal access to justice hours, time and treasure, lost, that may never be regained; rather than being misconstrued as cheering on the

roughshod I've received under Village policy hooves, you may declare that policy unconstitutional **Klostermann *v* Cuomo** 61 NY 2d 525; 475 NYS 2d 247; 463 NE 2d 588. Headnote [9] @NYS 2d 254:

> "The primary purpose of declaratory judgment is to adjudicate the parties' rights before a 'wrong' actually occurs ... (see Matter of Morgenthau v Erlbaum 59 NY 2d 143, 148; 464 NYS 2d 392, 451 NE 2d 150)"

In addition, remand for inquest on the quantum of damages and/or for a trial and for any other order or relief, which seems to this Court right and proper.

Pursuant to rule 44.2 of this Court: I the undersigned do hereby certify in good faith that this petition is restricted to other substantial grounds not previously presented and is not intended as any form of delay.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: May 6, 2008 Thomas Lamont Dyno

Thomas Lamont Dyno

State of New York
County of Broome